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IN THE SUPREME COURT OF THE UNITED STATES

NO. 75-5416

OCTOBER TERM, 1975

GEORGE ASHLEY MEEKS, III

Petitioner,

vs.

JOSEPH H. HAVENER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PAUL MANCINO, JR.
Attorney for Petitioner
One Public Square, Suite 1001
Cleveland, Ohio 44113 216-621-1742

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

CASE NO.

GEORGE ASHLEY MEEKS, III	:	
	:	
Petitioner,	:	
	:	
vs.	:	PETITION FOR WRIT OF CERTIORARI
	:	
JOSEPH H. HAVENER,	:	
	:	
Respondent.	:	

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, George Ashley Meeks, III, hereby petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, which court had affirmed the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, denying his petition for a writ of habeas corpus.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit did not write an official opinion. Instead, it entered an order adopting the memorandum and order of the United States District Court, which had denied the petition for a writ of habeas corpus. The United States District Court for the Northern District of Ohio, Eastern Division, did write a memorandum concerning the issues raised in the petition but the memorandum is not officially published.

JURISDICTION

The judgment and order sought to be reviewed was made and entered by the United States Court of Appeals for the Sixth Circuit on May 13, 1975. Thereafter, petitioner filed a timely petition for a rehearing, which petition for a rehearing was overruled by the United States Court of Appeals for the Sixth Circuit on June 18, 1975. The statutory provisions believed to confer jurisdiction on this Court to entertain and review the judgment and order in question is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether an identification of the petitioner as the alleged perpetrator of a robbery should have been suppressed by reason of the fact that the identification of the petitioner came about through law enforcement officials exploiting the fruits of an illegal and unlawful search and seizure of the apartment of the petitioner.

2. Whether petitioner was denied his rights under the Fifth Amendment when the court permitted the prosecuting attorney to introduce before the jury the fact that after the petitioner had been advised of his Miranda rights he refused to make any statement to the police.

3. Whether the petitioner was denied his constitutional right to a fair trial where during the course of his trial he was daily brought before the jury that was actually trying his case and also before the panel of prospective jurors handcuffed and schackled to a deputy sheriff.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service and time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division. Petitioner sought relief from his conviction which had occurred in the Court of Common Pleas of Lorain County, Ohio, in which he was convicted of the offense of armed robbery in violation of Section 2901.13 of the Ohio Revised Code and was sentenced to a term of imprisonment from ten to twenty-five years at the Southern Ohio Correctional Institution, where the respondent, Joseph H. Havener, is the warden.

Petitioner had been indicted by the Grand Jury of Lorain County, Ohio, on two separate occasions, both indictments charging him with the

offense of armed robbery. In his first indictment, which was Case No. 16691 in the Common Pleas Court of Lorain County, Ohio, petitioner was charged with committing an armed robbery on December 5, 1972, in the City of North Ridgeville, Ohio, hereinafter referred to as the North Ridgeville indictment. This indictment was returned by the Grand Jury of Lorain County, Ohio, on January 10, 1973.

Thereafter, in Common Pleas Court of Lorain County, Ohio Case No. 16750, another indictment was returned on February 15, 1973, charging the petitioner had committed the offense of armed robbery on December 15, 1972, which date was later amended to read December 5, 1972. This offense allegedly occurred in the City of Elyria and will hereinafter be referred to as the Elyria indictment.

Although both of the these indictments were returned on separate dates and the petitioner was arraigned separately on these indictments, they were then consolidated for a joint trial over the objection of the petitioner.

Since both of these cases were consolidated for trial, evidence concerning both offenses was jointly introduced into the evidence of this case. After the trial of this case, the jury returned a verdict of guilty as to the North Ridgeville indictment but was unable to reach a verdict on the Elyria indictment, which case was then dismissed on motion of the prosecution.

The petitioner, after exhausting all of his direct remedies of appeal in the Ohio court system, proceeded to file his petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division. After his petition had been filed, the District Court ordered that the respondent file a return. The respondent, instead of filing a return to the petition, filed a motion to dismiss. The District Court,

without conducting an evidentiary hearing and not acknowledging that it was considering the motion to dismiss, proceeded to rule upon the petition without an evidentiary hearing. The District Court based its decision upon the petition and transcript of the proceedings of what had occurred in the Common Pleas Court of Lorain County, Ohio.

The District Court denied petitioner's request for an evidentiary hearing and thereafter proceeded to dismiss the petition in a memorandum dated September 5, 1974.

In his petition, petitioner alleged various deprivations of his constitutional rights which had occurred during the proceedings in the Common Pleas Court of Lorain County, Ohio. The District Court went on to consider the various allegations raised by the petitioner and proceeded to dismiss each allegation. The District Court in ruling upon this matter went outside of the record without conducting the hearing in order to resolve some of the factual issues in this case.

After the dismissal of the petition in the United States District Court, an appeal was taken to the United States Court of Appeals for the Sixth Circuit. On May 13, 1975, the United States Court of Appeals for the Sixth Circuit entered an order affirming the judgment of the United States District Court. The United States Court of Appeals stated that the District Court properly decided the issues presented by the petitioner as shown in the memorandum of the United States District Court dated September 5, 1974. Petitioner's timely petition for a rehearing was overruled by the United States Court of Appeals on June 18, 1975, and thereafter petitioner brings this request for a petition for a writ of certiorari to review that judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

POINT I

WHERE LAW ENFORCEMENT OFFICERS CONDUCT AN ILLEGAL SEARCH AND SEIZURE OF PETITIONER'S APARTMENT AND SEIZE VARIOUS ITEMS OF PROPERTY WITHIN THAT APARTMENT AND THEREAFTER EXPLOIT THE USE OF THOSE ITEMS SO SEIZED IN THE APARTMENT OF THE PETITIONER, WHICH EXPLOITATION BY THE LAW ENFORCEMENT OFFICERS RESULTS IN AN IDENTIFICATION OF THE PETITIONER AS AN ALLEGED PERPETRATOR OF ANOTHER OFFENSE, SUCH AN IDENTIFICATION MUST BE SUPPRESSED AS THE FRUIT OF AN UNLAWFUL SEARCH.

Petitioner asserted in his petition that the fruits of an unlawful search and seizure made of his apartment were subsequently utilized and exploited by the police which resulted in his trial in the Common Pleas Court of Lorain County, Ohio, and his identification as an alleged perpetrator of the offense for which he was on trial. The District Court in dismissing this claim stated as follows:

> The next ground for relief asserted pertains to a search of an apartment made following petitioner's arrest in the parking lot on the premises. The simple answer to this contention is that not only was none of the material found in the apartment used in evidence against the petitioner, but, in fact, there is no indication that any of the material seized therein bore any relation to the charge upon which the petitioner was convicted. (Memorandum of the District Court p.4).

Petitioner did not contend that the actual physical evidence seized in the apartment was used against him in his trial in the Common Pleas Court of Lorain County, Ohio. Instead, petitioner contended that the law enforcement officers used the physical evidence seized in the apartment and exploited the fruits of their illegal search and seizure in obtaining an identification of the petitioner as the perpetrator of the offense.

The record shows that the petitioner was arrested in the parking lot of an apartment building where he lived in the City of Fairview Park, Ohio. Petitioner was arrested because he was a walk-away from the Marion

Correctional Institution. After the petitioner had been arrested and placed in custody of the police officers, various police officers then proceeded into the apartment building to the apartment suite that was occupied by the petitioner. They made an entry into the apartment suite at gunpoint and proceeded to search the entire apartment suite. While searching the apartment suite, the police officers found some money in a bureau drawer which bore a bank stamp of a bank located in the City of North Ridgeville, Ohio. The police officers then contacted the police for the City of North Ridgeville, Ohio and asked them if there had been any robberies committed lately in that city. The police officers for the City of North Ridgeville responded that there had been.

As a result of this information, a police officer from the City of North Ridgeville, Ohio, proceeded to the police station in the City of Cleveland, Ohio, where the petitioner was being held and proceeded to take his photograph. While so photographed, a photograph of the petitioner was then taken to the victim of the holdup who then made an identification.

Up to this point, the North Ridgeville police had no leads on the robbery and it was only by virtue of the finding of the money in the bureau drawers of an apartment that was being occupied by the petitioner that the connection was made. Since the search of the apartment was plainly illegal, unlawful, and unconstitutional, the police officers merely exploited their illegality in obtaining an identification of the petitioner as the perpetrator of the offense. Had the police officers not searched the apartment of the petitioner, the petitioner would in no way have been connected with the North Ridgeville robbery.

Petitioner, prior to his trial in the Common Pleas Court of Lorain County, Ohio, filed a motion to suppress the evidence. He moved to suppress not only the physical evidence that was seized in the apartment building but also all fruits of the illegal search and seizure, including the identification of the petitioner.

The District Court and also the Court of Appeals were confused on which offense the seizure of the money in the apartment of the petitioner bore any relationship to. Had it not been for the seizure of the money with the wrappings from a bank in the City of North Ridgeville, Ohio, petitioner would not have been in any way connected with that offense nor would he even have been a suspect in that offense.

The trial transcript of the petitioner shows that as a result of the search of petitioner's argument, a gun and certain money containing wrappers from a North Ridgeville, Ohio bank were seized. It was on the basis of these wrappers that the Cleveland police called the North Ridgeville police and found that a robbery had occurred in the City of North Ridgeville, Ohio. Based upon this information, petitioner was then connected with the robbery, arrested by a North Ridgeville police officer, placed in a lineup, and the prosecution in the Common Pleas Court of Lorain County, Ohio initiated. Thus, without the finding of the tainted money in the apartment of the petitioner as a result of the unlawful search and seizure, the prosecution would never have been commenced.

The police officers involved in this case admitted that had not this money been found, they would have had no way of knowing that the petitioner was in any way connected with the robbery. As the original source of the evidence was unlawfully and unconstitutionally obtained in the first instance,

all evidence derived therefrom must likewise be suppressed. This would include the entire proceedings before the court together with the arrest of the petitioner, his subsequent photographic and lineup identifications and all evidence used by the prosecution to connect the petitioner with the robbery.

While the actual physical evidence seized in the apartment was not offered at the trial of the petitioner, it was the fruits and derivatives of that evidence that was used against the petitioner. Under the exclusionary rule of the Fourth Amendment, all evidence directly obtained or derived from an illegal search and seizure must also be suppressed. See United States v. Calandra, 414 U.S. 338, 347 (1974); Wong Sun v. United States, 371 U.S. 471, 484 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

The decision in this case in this respect clearly runs contrary to the recent decision by this court in Brown v. Illinois, 95 S. Ct. 2254 (1975). In the Brown case this court held that where a suspect in a criminal case who had been arrested without probable cause and without a warrant and under circumstances indicating that his arrest was investigatory, thereafter made a statement to the police, even after being given his Miranda warnings was entitled to have his confession suppressed as being the fruit of an illegal arrest. This court answered that question in the affirmative.

The same reasoning would apply in this case. Had it not been for the finding of the money in a bureau drawer in petitioner's apartment as a result of the clearly unlawful search and seizure of that apartment, petitioner would have never been connected with the offense occurring in North Ridgeville, Ohio, of which he was subsequently convicted. His identification as the alleged perpetrator of that offense came directly from police exploiting items found by virtue of their unlawful and unconstitutional search and seizure.

Although in this case it was an identification of the petitioner which was the direct result of the exploitation of that unlawful search and seizure, as contrasted with a confession in the Brown case, no different result must obtain. Other courts have held that where there is an unlawful arrest or an unlawful search and seizure and an identification results from that, such an identification must be suppressed as being the fruit of the unlawful arrest. See People v. Hornal, 330 N.E. 2d 225 (Ill. Ct. App. 1975).

Moreover, this decision is clearly contrary to a decision by the United States Court of Appeals for the District of Columbia in Gatlin v. United States, 326 F. 2d 666 (D.C. Cir. 1963). In that case, it was held that where a person had been illegally arrested and thereafter an identification resulted from the illegal arrest, the identification must be suppressed as a result of the illegal arrest. Since it has been determined by this court that an arrest and a search both must be based upon probable cause and where the search is illegal and unlawful and by virtue of that search certain physical evidence is seized and that evidence is exploited by law enforcement officers, not only must the actual physical evidence seized in a search be suppressed but also the fruits of that unlawful search and seizure. In this case, the fruits of the unlawful search and seizure was the identification of the petitioner and this should have been suppressed.

POINT II

PETITIONER WAS DENIED HIS RIGHTS UNDER THE FIFTH AMENDMENT WHEN THE COURT PERMITTED THE PROSECUTOR TO INTRODUCE BEFORE THE JURY THE FACT THAT THE PETITIONER AFTER HAVING BEEN ADVISED OF HIS MIRANDA RIGHTS REFUSED TO MAKE A STATEMENT TO THE POLICE.

Petitioner alleged that he had been denied his constitutional rights in that the prosecution offered as a witness a police officer and questioned

the police officer concerning the fact that the petitioner, after having been advised of his constitutional rights, including his right to remain silent, refused to make a statement and remained silent. At the trial of the petitioner's case, the prosecution offered Sgt. Ronald Bauer, who testified that he had come to see the petitioner after he had been arrested. This witness testified that he advised the petitioner of his constitutional rights and then asked the petitioner if he wished to make a statement. The witness stated that the petitioner declined and made no statement. A motion was made that this evidence be stricken from the consideration of the jury, but this request was overruled, the trial court holding that this evidence was proper because the petitioner did not make a statement.

The District Court, in ruling upon this subject, found that the allegations by the petitioner were correct and that the petitioner after having been advised of his constitutional rights, including his right to remain silent, refused to make a statement. Petitioner contended that to allow the prosecution to bring before the jury the fact that the petitioner chose to remain silent after he had been advised of his constitutional rights, including his right to remain silent, constituted an impermissible comment in violation of the guarantess of the Fifth Amendment.

The District Court did state that it would be improper for the prosecutor to pursue this line of questioning. In the memorandum of the District Court, the following was stated:

> If the matter stood at this point, a question might be presented as to whether the prosecuting attorney had acted improperly in bringing out the challenged line of inquiry. (Memorandum of District Court p. 7).

However, the District Court did not stop at this point but went

further and stated that it would be competent to receive in evidence any voluntary statement made by the petitioner and as a predicate to the introduction of such evidence, to receive testimony as to the advice of the constitutional rights.

However, the District Court was clearly in error on this subject. The constitutional rights of the petitioner were violated by the prosecuting attorney when he pursued the line of questioning in the first instance when he knew that the answer from the witness would be that the petitioner, after having been advised of his constitutional rights, refused to make any statement at all and chose to invoke his right of silence. Since the petitioner when advised of his rights and asked if he wished to make a statement chose not to make any statement at that point, this particular line of inquiry would have no bearing and would be an impermissible comment upon the right of the petitioner to remain silent.

The allowing of this type of testimony is contrary to Miranda v. Arizona, 384 U.S. 436 (1966), wherein this court specifically stated in a footnote that it would be improper to comment on the refusal of an accused to speak when questioned:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecutor may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. . . 384 U.S. at 468 n. 37.

It must further be remembered in this case that the petitioner did not testify at his trial. Thus, "The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying. . . are of course vastly different. . .His 'voluntary offer of testimony upon any

fact is a waiver as to all relevant facts, because of the necessary connection between all.'". . . Johnson v. United States, 318 U.S. 189, 195 (1943).

The decision reached in this case is clearly contrary to a decision by the United States Court of Appeals for the Tenth Circuit in United States v. Arnold, 425 F. 2d 204 (10th Cir. 1970). In the Arnold case, the government during the direct examination of one of its witnesses proceeded to ask the witness as to whether the defendant had been advised of his constitutional rights and what rights he had been so advised. After it had been elicited from the witness that the defendant had been so advised of his constitutional rights mandated by Miranda, the witness then testified that the defendant made no statement. In holding this to be impermissible, the Court of Appeals stated as follows:

> Since the Miranda warnings here given were not intended as a foundation for the admission of a voluntary inculpatory statement of the defendant, this testimony served no probative purpose and did no more than turn on the red light of potential prejudice involving defendant's Fifth Amendment right. . . . 425 F. 2d at 206.

The same thing occurred in this case for the prosecution knew that the petitioner had made no statement in response to the questioning by the law enforcement officer. Since this was done, this questioning was not as a prelude to the admission of a statement made at that point. Thus, this constituted an impermissible comment upon the rights of the petitioner.

This very subject was approached by this court in a recent decision in United States v. Hale, 95 S. Ct. 2133 (1975). In the Hale case, the accused, at his trial, was cross-examined by the prosecutor concerning the fact that he did not answer any questions of police officers when he had been arrested. While the very basis of the decision in the Hale case was on a

non-constitutional basis, the constitutional basis was also alluded to in the decision and it would appear that this case would present an opportunity for the court to decide whether the constitution prohibits evidence of the invocation of the right to remain silent after a person under arrest has been advised of his constitutional rights in accordance with the mandate of Miranda.

There have been a number of decisions by the various courts of appeals on this subject and one court has held that an accused who has been arrested and evidence that he refused to answer any question was constitutional error. United States v. Bridges, 499 F. 2d 179 (7th Cir. 1974). In another case, it was held that evidence that an accused wanted a lawyer after being first questioned was error. Baker v. United States, 357 F. 2d 11, 13-14 (5th Cir. 1966).

The police officer was permitted to testify over objection concerning the fact that a petitioner had refused to make a statement after having been advised of his right to remain silent was thus lost by the introduction of this highly prejudicial evidence. United States v. Kroslack, 426 F. 2d 1129, 1130 (7th Cir. 1970); Baker v. United States, 357 F. 2d 11 (5th Cir. 1966). See Walker v. United States, 404 F. 2d 900, 902 (5th Cir. 1968).

Other courts have held that it is prejudicial error for the prosecution to offer evidence that the defendant chose not to make a statement after having been advised of his constitutional rights. The controlling authority for this proposition is United States v. Nolan, 416 F. 2d 588, 594 (10th Cir. 1969), where the court stated as follows:

> We see no difference in principle in the exercise by the defendant of his constitutional right not to testify and his constitutional right to remain silent and refrain from making either an inculpatory or exculpatory statement to the officers who had taken him into custody for a federal

> offense. In either case, the comment would greatly impair such privilege and penalize the exercise thereof. . . .

Accord, Johnson v. Patterson, 475 F. 2d 1066 (10th Cir. 1973). See Grunewald v. United States, 353 U.S. 391, 421-23 (1957).

The weight of authority holds that it is prejudicial error to adduce testimony, or in argument to allude to the fact, that an accused exercised his Fifth Amendment right to remain silent. People v. Bobo, 390 Mich. 355, 212 N.W. 2d 190 (1973); Hines v. People, 497 P. 2d 1258 (Colo. 1972); see also Fagundes v. United States, 340 F. 2d 673 (1st Cir. 1965); Foule v. United States (9th Cir. 1969), 410 F. 2d 48; State v. Greer, 17 Ariz. App. 162, 496 P. 2d 152 (1973); State v. Shing, 109 Ariz. 361, 509 P. 2d 698 (1973); State v. Griffin, 120 N.J. Super, 13, 293 A. 2d 217 (1972); United States ex rel. Young v. Follette, 308 F. Supp. 670 (S.D.N.Y. 1970); Deats v. Rodriquez, 477 F. 2d 588; United States v. Arnold, 425 F. 2d 204 (10th Cir. 1970; Harv. L. Rev. 882 (1974).

As stated in Johnson v. Patterson, 475 F. 2d 1066, 1068 (10th Cir. 1973):

> It would be irregular and anomalous to warn an accused that he has the right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him. . . . This would be the practical effect of allowing the prosecution to use at trial the fact that an accused remained silent, clearly making the assertion of the constitutional right costly.

POINT III

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN DURING THE COURSE OF PETITIONER'S TRIAL HE WAS DAILY BROUGHT BEFORE NOT ONLY THE PANEL OF PROSPECTIVE JURORS IN PETITIONER'S CASE BUT ALSO BEFORE THE ACTUAL PANEL OF JURORS WHO WAS TRYING PETITIONER'S CASE SHACKLED AND HANDCUFFED TO A DEPUTY SHERIFF.

Petitioner alleged that he was denied his right to a fair trial in

that both the panel of prospective jurors and the actual trial jurors who heard petitioner's case were permitted to see petitioner being brought into the court room in schackles and handcuffs accompanied by a deputy sheriff. Petitioner was daily brought into the court room through the main hall of the Lorain County, Ohio court house. The jurors were seated outside of the court room in the hallway and petitioner was daily brought in front of not only the panel of prospective jurors prior to the actual trial of this case but also before the panel of actual trial jurors who heard this case. In each instance, he was schackled and handcuffed to a deputy sheriff while being brought to the court room.

It is the contention of the petitioner in this case that under the circumstances of this case, when adequate or other safeguards could have been taken, that the petitioner was denied his right to a fair trial. The District Court in dismissing this claim stated as follows:

> The third claim of the petition pertains to the petitioner having been observed by jurors while in restraint. It does appear from the record that the petitioner was brought to the court room in handcuffs. There is no reference to schackles in counsel's remarks at the trial when he protested the situation. It would also appear from the record that it is possible that both prospective and actual members of the jury observed the petitioner being conducted into the court room. However, while counsel moved for a dismissal of the panel based upon this contentions in this regard, no voir dire was requested of the jury to actually determine if any of its members had observed the petitioner, and if so, whether such observation would influence their decision, in any event, the Court believes that in light of petitioner's status as an escapee it was appropriate to conduct him through public areas in restraint, and that under the circumstances described by the trial judge as to conditions in the court building, the possibility of the defendant being observed while under restraint was inavoidable. The Court finds no violation of the petitioner's constitutional rights in this regard. (Memorandum of District Court pp. 4-5).

It is readily apparent that the District Court, while acknowledging

that there was an issue, completely failed to cope with the issue. Even the equivocation of the District Court would have required that an evidentiary hearing be held upon this matter.

Petitioner alleged that he was brought to court not only in handcuffs but also in schackles. This the undersigned also knows of his own personal knowledge. While the record does not reflect exactly the situation as to how it occurred, this would mandate that an evidentiary hearing be held upon these allegations.

There is no question that all of the prospective jurors did see the petitioner being brought into the court room as the petitioner was brought right in front of all of the prospective jurors who were seated outside of the court room waiting to be called. This in and of itself would be prejudicial. The court did not doubt that counsel's statement that the prospective jurors had seen the petitioner being brought to the court room in handcuffs and schackles was not true. All the court stated was that he could do nothing and would do nothing.

It is readily apparent that the court would take no corrective action at all for this very same thing occurred the following day when the trial had started and the jury had been selected. On the following day again all of the members of the actual jury were seated outside of the court room and the petitioner was brought right in front of all of these jurors in handcuffs and schackles to the deputy sheriff.

Petitioner does not contend that the sheriff may not use restraints in transporting the petitioner to and from the county jail. However, certainly those members of the actual jury who were hearing the case should not be allowed to view the petitioner while being brought to the court room.

The Lorain County Court House contains three floors. The court room where the petitioner was being tried is on the second floor. Adequate arrangements could have been made to have the jury remain in a different part of the building while the petitioner was being brought to the trial. Notwithstanding the protestations of the petitioner, no arrangements were made or even contemplated by the court.

While it can be concluded that if safeguards had been taken to not have the jury see the petitioner being brought into the court room in handcuffs and schackles, then the possibility of the jurors seeking the petitioner would be unavoidable. However, the failure of the trial court to take any corrective action at all to see that the members of the jury would be in a different part of the courthouse while the petitioner was being brought to the court room in handcuffs and schackles made the confrontation all but inevitable.

When the request was made to dismiss the panel of prospective jurors, certainly the court was required, sua sponte, to inquire of the jury whether they had seen this and what effect this would have upon them if any.

This state of the record would require either that the District Court grant relief to the petitioner or that the court conduct an evidentiary hearing upon this particular issue. This would be required for the reason that the record shows that the jurors did in fact see the petitioner being brought to the courtroom. Moreover, the doubt in the mind of the District Court as to whether both handcuffs and schackles were would also be cleared up at an evidentiary hearing. Here, based upon the trial record which is clearly insufficient and does not contain all of the surrounding circumstances, an evidentiary hearing would be required under these circumstances.

Moreover, even based upon the state trial record, relief must be given to the petitioner. As it affirmatively shows that both the prospective panel of jurors and the actual jurors who heard and tried this case did see the petitioner being brought to the courtroom in handcuffs and schackles, his right to a fair trial has been denied to him and his presumption of innocence has been interferred with in an erroneous manner.

Certainly, this constitutes prejudicial and reversible error and denies to the petitioner his right to a fair and impartial trial. In one decision it was stated that "freedom from schakling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial. . . ." Odell v. Hudspeth, 189 F. 2d 300, 302 (10th Cir. 1951).

Moreover, this follows the general proposition on this subject:

> . . . . However, an accused should not be subjected, before conviction, to any more restraint than is necessary for this purpose and there must be no conduct which would inflame the passion or prejudice of the jury against the accused. Accordingly, a defendant being tried for a criminal offense on a plea of not guilty was entitled, at common law, to make his appearance free from schackles or bonds. This is also the present rule, and the right is recognized as an important component of a fair and impartial trial. 21 Am. Jur. 2d, Criminal Law, §240 at 276 (1965).

In another case, it was observed that "the court was well aware that it is prejudicial for defendants to be schackled in the courtroom. . . ." Lowe v. United States, 339 F. 2d 911, 919 (9th Cir. 1968).

With the panel of prospective jurors and with the juryuho did hear this case being able to view the defendant in handcuffs accompanied by a deputy sheriff has its obvious deleterious implications. These are prejudicial to the defendant. As poignantly observed by one court:

> His being restrained must carry various implications to even the most fair-minded of juries. State v. Roberts, 86 N.J. Super. 159, 168, 206 A. 2d 200, 205 (1965).

In a habeas corpus proceeding a defendant was granted relief in a federal habeas corpus by reason of the fact that the court had the defendant shackled during the course of the trial. Woodards v. Cardwell, 303 F. Supp. 690, 695-98 (S.D. Ohio 1969), aff'd, 430 F. 2d 978 (6th Cir. 1970).

In other cases, it has been held that where the court takes proper protective measures and instructs the jury to draw no inference of any type concerning the shackling or handcuffing of a defendant then no error intervenes. United States v. Acosta-Garcia, 448 F. 2d 395, 396 (9th Cir. 1971). However, a duty devolves upon the court to declare a mistrial where jurors have seen the defendants in handcuffs and no corrective or protective measures have been taken as to negative the inherent prejudice from this type of activity. See United States v. Wilkerson, 452 F. 2d 657, 660-61 (8th Cir. 1971).

Therefore, the viewing of the petitioner in handcuffs by both the panel of prospective jurors in this case and, after the commencement of the trial, by the jurors who actually were to hear and determine this case results in manifest prejudice requiring that the judgment under review be reversed.

Other courts have held that a basic right of a defendant in a criminal case is that he is presumed innocent until his guilt is established beyond reasonable doubt and that in the presence of the jury he is ordinarily entitled to be relieved of handcuffs or other unusual restraints so as not to mark him as one who is obviously bad mannered or to suggest that the fact of his guilt is a foregone conclusion. United States v. Samuel, 431 F. 2d 610, 614-15 (4th Cir. 1970).

In order to constitute a fair trial, an accused is entitled to be free from handcuffs, shackles, and manacles during the course of the trial. See Way v. United States, 285 F. 2d 253, 254 (10th Cir. 1960).

The mere fact that an accused is handcuffed to a deputy sheriff while being taken to the courtroom certainly is evidence of prejudice. See United States v. Larkin, 417 F. 2d 617 (1st. Cir. 1969); O'Shea v. United States, 400 F. 2d 78 (1st Cir. 1968).

Petitioner does not contend that under no circumstances may an accused in a criminal case be handcuffed but where it is easy to avoid this prejudicial effect upon a trial jury such can be avoided. Petitioner complained to the trial judge of this fact but the trial judge took no remedial action. This could have easily been avoided by having the jurors wait in another portion of the court room until the petitioner was brought into the court room. However, this action was not taken and clearly the right of the petitioner to a fair trial was seriously prejudiced by this conduct.

C O N C L U S I O N

This case presents several issues of great importance. One of those issues is the exploitation of the fruits of an unlawful search and seizure which result in the identification of a person as a perpetrator of an offense. This clearly runs contrary to the exclusionary rule as adopted by this court. This issue should be considered by this court and also the fact of comment upon the refusal of an accused in custody to make any statement after he had been advised of his constitutional rights mandated by Miranda. Therefore, the petition for a writ of certiorari should be allowed and this cause heard

upon a consideration of the entire record.

PAUL MANCILLO, JR.
Attorney for Petitioner
One Public Square, Suite 1001
Cleveland, Ohio 44113 621-1742

APPENDIX A" Order of the United States Court of Appeals (filed June 18, 1975)

NO. 74-2288

FILED

JUN 18 1975

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE ASHLEY MEEKS III

Petitioner-Appellant

v.

JOSEPH H. HAVENER

Respondent-Appellee

ORDER

BEFORE: MILLER and LIVELY, Circuit Judges; and O'SULLIVAN, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by petitioner-appellant, the court concludes that no issues are raised therein which were not considered and decided upon the submission of this appeal.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By Grace Keller
Grace Keller
Chief Deputy

APPENDIX "B" Order of the United States Court of Appeals
(filed May 13, 1975)

FILED
JUL 31 9 41 AM '75
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

FILED
MAY 13 1975
JOHN P. HEHMAN, Clerk

NO. 74-2288

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE ASHLEY MEEKS, III

Plaintiff-Appellant

v.

JOSEPH H. HAVENER, Superintendent

Defendant-Appellee

ORDER

C74-480

BEFORE: MILLER and LIVELY, Circuit Judges and O'SULLIVAN, Senior Circuit Judge.

This is an appeal from denial of a writ of habeas corpus following conviction in a state court of Ohio for armed robbery. On appeal, it is contended that the petitioner was entitled to an evidentiary hearing on a number of the issues. The district court did not grant such a hearing, but decided the case on the basis of the state court record. Upon consideration of the record, briefs and oral arguments, this court concludes that the district court properly decided the issues presented by the petitioner as shown by the memorandum of United States District Judge Ben C. Green dated September 5, 1974.

Affirmed.

ENTERED BY ORDER OF THE COURT

Issued as mandate: July 29, 1975
COSTS: NONE

John P. Hehman
Clerk

APPENDIX "C"
MEMORANDUM OF DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE ASHLEY PRICE, XXI	)	
	)	
Petitioner	)	Case No. 673-410
	)	
v.	)	MEMORANDUM
	)	
JOSEPH M. HUDDLE, etc.	)	
	)	
Respondent	)	

CHEAL, J.:

Petitioner, in this proceeding upon a petition for a writ of habeas corpus, is a prisoner at the Lorain [illegible] Correctional Institution. His present confinement is as a consequence of multiple violations of the law.

In 1970 petitioner was indicted in Cuyahoga County for the crimes of burglary, larceny, and forcing entry into a safe. Upon a plea of guilty to the burglary charge, the remaining charges were dismissed, and petitioner was placed on five years probation. In May, 1972 he was arrested and committed on a probation violation, and six months later escaped from the Marion Correctional Institution.

In January, 1973 petitioner was indicted in Cuyahoga County on two separate indictments. One indictment charged him with two counts of assault with a dangerous weapon and one count of armed robbery, and the other charged

two counts of armed robbery, and one count of assault with intent to rob. Petitioner was also indicted that same month in Lorain County upon two indictments, each charging a count of armed robbery.

As to the Cuyahoga County indictment, petitioner entered a plea of guilty on the first indictment to one count of assault with a dangerous weapon, and the remaining counts thereof were dismissed. He went to trial before a jury on the second indictment, and was found guilty of the two counts of armed robbery. He was sentenced to one to five years upon both his plea and the conviction, all sentences to be served concurrently.

In Lorain County petitioner went to trial on both charges, and was found guilty by a jury upon one indictment. The jury was unable to agree upon a verdict on the second charge. He was sentenced to a term of 10 to 25 years upon the conviction, and the second indictment was dismissed with the consent of the prosecution.

In addition to the foregoing, petitioner is also serving his sentence arising from the original confinement from which he escaped.

The instant petition attacks the Lorain County proceedings. It is drawn in accordance of a narrative form, and the alleged violations of constitutional rights which underlay the instant petition must be gleaned therefrom.

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It would appear that the following are the grounds for re-
[illegible] in the petition:

1. [illegible] No. 76750 the trial court
[illegible] the indictment, to be
[illegible] to charge the crime of the
[illegible] charged under Code 15;
[illegible] to December 3, 1972.

2. [illegible] denial of an unlawful arrest-
[illegible] search were used against
[illegible] petitioner.

3. [illegible] members of the jury observed
[illegible] lawyer being brought in the
[illegible] in irons in the presence
[illegible] jury.

4. [illegible] was subjected to
[illegible] prejudicial adverse publicity.

5. [illegible] was arrested by vio-
[illegible] state rules which
[illegible] constitutional rights of
[illegible] to be a citizen of this
[illegible].

6. [illegible] prosecutor exercised his pre-
[illegible] challenges.

7. [illegible] discrimination of the race [illegible]
[illegible] jury [illegible] and sex.

8. [illegible] question which must be resolved is
[illegible] is entitled to an evidentiary hearing on
the [illegible] grounds. In order to decide a question
of [illegible] court has examined the transcript of the
[illegible] proceedings.

[illegible] true, a criminal trial must be kept free
[illegible] influences and disorder which destroy its
[illegible] [illegible] trial upon both its substance and

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trial, he was convicted only in case No. 16691. The charge against petitioner in case No. 16750 was dismissed on the jury's failure to agree upon a verdict. Therefore, any error committed in case No. 16750 would afford petitioner no right to relief, unless it was such a broad infringement of constitutional rights as to preclude the consolidated trial in its entirety.

It therefore follows that the consolidation of the indictments, which was done pursuant to Penal Statute, does not present any claim for relief herein. The indictment which was quashed was in case No. 16750.

The main ground for relief presented petitioner in a manner as to create the false impression that petitioner is in the position he is on the premises. The simple answer to this contention is that not only was there no [illegible] found on the apartment used in evidence against petitioner, but, in fact, there is no indication that any of the [illegible] seized therein by reason of the search warrant in petitioner's possession was considered.

The second claim of the petition pertains to [illegible] having been observed by persons while in residence. It does appear from the record that petitioner was brought to the courtroom in handcuffs. There is no reference to shackles in counsel's remarks at the trial that he protested the affixing. It would also appear from the record that

it is possible that both prospective and actual members of the jury observed the petitioner being escorted to the courtroom. However, while counsel moved for the discharge of the panel based upon his observations in this regard, he made clear that exposure of the jury to actually developed if any of the members had observed petitioner and, if whether such observation would influence their decisions. In any event, the Court believes that in light of petitioner's escape as an example of the opportunities to escape [illegible] public areas in general, and that under the circumstances outlined by this trial judge as to exist in the court building, the possibility of the unfortunate being observed under restraint was remote. The court finds no violation of petitioner's constitutional rights in this regard.

The next issue involves alleged improper identification procedures. In the prosecution's case in chief, a display of each robbery to which [illegible] at the person who had committed the crime. Both of the witnesses had previously identified petitioner in police and [illegible] directed to them. It was subject to the issue that there were irregularities in the lineup procedures in which petitioner was exhibited by the [illegible] in each [illegible]. However, that was the case [illegible] decided. The record fails that some was unfair in any

in the pre-trial identification by the victim in case No. 14691. While there is a conflict of testimony as to whether petitioner was dressed in the same clothing in the lineup as had been described in his statement, the victim testified that he did not note the clothing and that his identification in each instance was based on physical features.

The fifth claim of error is that a prosecution witness was allowed to testify in a manner that "violated the rights" of the petitioner to be free from illegal and unconstitutional arrest or the exclusion of the testimony of the petitioner against self-incrimination." A police officer who had previously read out all of petitioner's rights to him proved testified that while transporting petitioner in a police vehicle he had said to petitioner "you might as well come clean", and recounted that petitioner then admitted the crime; that:

> When I said it, I was in the process of putting on the cuffs. He asked if I could have a cigarette and we stopped at this point, and [illegible]

At that point in the testimony defense counsel objected, and he had to the relative line of inquiry, and the trial judge sustained the objection, stating:

> If the defendant asks anything, then there [illegible] any [illegible] asked of him.

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[illegible] [illegible] [illegible] [

-66-

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